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FirstEnergy Generation Corp. and International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO. Case 06-CA-036631

April 14, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On August 6, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 96. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 96, which we incorporate by reference.¹

¹ In addition to affirming the modifications of the judge's recommended Order contained in the now-vacated Decision and Order, we shall further modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and we shall modify the notice to conform to *Durham School Services*, 360 NLRB No. 85 (2014).

In agreeing with the judge's conclusion that the Respondent's unilateral change to future retiree healthcare benefits was unlawful, Member Johnson relies only on the judge's finding that the Respondent failed to meet its burden of proof to establish that it made changes to those benefits with such regularity and frequency that the "practice" would be expected to continue or reoccur on a regular and consistent basis. *Church Square Supermarket*, 356 NLRB No. 170, slip op. at 6 (2011). He finds it unnecessary to rely on the judge's finding that the retirement benefit change here is significantly different from past changes.

ORDER

The National Labor Relations Board orders that the Respondent, FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees without first notifying International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO and giving it an opportunity to bargain.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act.

(b) Rescind the change in the terms and conditions of employment for its unit employees that was unilaterally implemented on July 1, 2009.

(c) Make all former employees who retired on or after July 1, 2009, or who subsequently retire, whole for any loss of earnings and other benefits suffered as a result of the changes that were unilaterally implemented on July 1, 2009, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected former employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each affected former employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of compensation due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Shippingport, Pennsylvania facility copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 6 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 14, 2015

Kent Y. Hirozawa,	Member
Harry I. Johnson, III,	Member
Lauren McFerran,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT change your terms and conditions of employment without first notifying International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All production and maintenance employees, including Control Room Operators, employees in the Stores, Electrical, Maintenance, Operations, I & T, and Yard Departments at the Bruce Mansfield Plant, excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on July 1, 2009.

WE WILL make all former employees who retired on or after July 1, 2009, or who subsequently retire, whole for any loss of earnings and other benefits resulting from the changes that were unilaterally implemented on July 1, 2009, plus interest.

WE WILL compensate the affected former employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each affected former employee.

FIRSTENERGY GENERATION CORP.

The Board's decision can be found at www.nlr.gov/case/06-CA-036631 or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

